**S T A T E O F T E N N E S S E E**
OFFICE OF THE
**ATTORNEY GENERAL**
**425 Fifth Avenue North**
**NASHVILLE, TENNESSEE 37243-0497**

March 13, 2007

Opinion No. 07-29

Constitutionality of Senate Resolution 17.

## QUESTION

Whether Senate Resolution 17 violates either the Establishment Clause of the United States Constitution or Article I, Section 4 of the Tennessee Constitution.

## OPINION

Senate Resolution 17 violates neither the Establishment Clause of the United States Constitution, nor Article I, Section 4 of the Tennessee Constitution.

## ANALYSIS

Senate Resolution 17[1] states as follows:

SENATE RESOLUTION 17
By Finney R.

A RESOLUTION to request the commissioner of education to provide answers to questions concerning creationism and public school curriculums in Tennessee.

BE IT RESOLVED BY THE SENATE OF THE ONE HUNDRED FIFTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, that the commissioner of the department of education, in consultation with any other persons whether within or without state government, is hereby respectfully requested by this body to respond to the following questions:

*(1) Is the Universe and all that is within it, including human*

[1]Senate Resolution 17 has not yet passed. As of the date this opinion was issued, the Resolution has been referred to the Senate Education Committee.

*beings, created through purposeful, intelligent design by a Supreme Being, that is a Creator?*

Understand that this question does not ask that the Creator be given a name. To name the Creator is a matter of faith. The question simply asks whether the Universe has been created or has merely happened by random, unplanned, and purposeless occurrences.

Further understand that this question asks that the latest advances in multiple scientific disciplines ---– such as physics, astronomy, molecular biology, DNA studies, physiology, paleontology, mathematics, and statistics -—- be considered, rather than relying solely on descriptive and hypothetical suppositions.

If the answer to Question 1 is "Yes," please answer Question 2:

*(2) Since the Universe, including human beings, is created by a Supreme Being (a Creator), why is creationism not taught in Tennessee public schools?*

If the answer to Question 1 is "This question cannot be proved or disproved," please answer Question 3:

*(3) Since it cannot be determined whether the universe, including human beings, is created by a Supreme Being (a Creator), why is creationism not taught as an alternative concept, explanation, or theory, along with the theory of evolution in Tennessee public schools?*

If the answer to Question 1 is "No" please accept the General Assembly's admiration for being able to decide conclusively a question that has long perplexed and occupied the attention of scientists, philosophers, theologians, educators, and others.

BE IT FURTHER RESOLVED, that the commissioner of education is requested to deliver her response to this request in report form to the Speaker of the Senate before January 15, 2008.

BE IT FURTHER RESOLVED, that an appropriate copy of this resolution be prepared and sent to the commissioner of education.

We would first note that this resolution does not create any new law or statute. Nor does it require or compel any kind of action regarding religion, and no sanctions or penalties are imposed or even threatened. The resolution merely *requests* that the Commissioner of the Department of Education answer three (3) questions concerning religion and creationism, and imposes no sanction in the event the Commissioner of Education declines to answer.

Based upon these factors, this Office concluded in a 2005 opinion[2] that a Senate Joint Resolution designating a "Tennessee Day of Prayer" to coincide with a "National Day of Prayer," and urging "all Tennesseans to observe the day of prayer in accordance with their respective faiths," was not a "law," as that term is employed in the Establishment Clause. The Establishment Clause of the First Amendment to the United States Constitution[3] states that "Congress shall make no ***law*** respecting an establishment of religion." (Emphasis added).

A "law," as was noted in our previous opinion, is defined as,

> A binding custom or practice of a community: a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (As an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision or usage) made, recognized or enforced by the controlling authority. *Webster's Third New International Dictionary (unabridged)*. The Supreme Court has stated that fundamental to the existence of a law is the obligation it creates and the sanction it imposes. It is a matter of compulsion and does not take the nature of a plea, suggestion, or request. [4]

Senate Resolution 17 compels no action regarding religion, and imposes no sanction for disobedience. This resolution is therefore not the type of "law" that may infringe upon the terms of the Establishment Clause.

Furthermore, insofar as Senate Resolution 17 merely asks three questions concerning religion and the teaching of creationism in Tennessee schools, it is difficult to interpret the resolution as a

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[2]*See* Tenn. Op. Atty. Gen. No. 05-063 (April 27, 2005)(copy attached).

[3]The Establishment Clause is made applicable to the states by the Fourteenth Amendment to the United States Constitution.

[4]*Id., citing American Banana Co. v United Fruit Co.*, 213 U.S. 347, 356-357, 29 S.Ct. 511, 512-513, 53 L.Ed. 826 (1909) and *United States Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34, 37, 50 S.Ct. 165, 167, 74 L.Ed. 683 (1929).

measure "establishing" religion in contravention of the Establishment Clause.[5] Similarly, Article I, Section 4 of the Tennessee Constitution provides as follows:

> That no political or religious test, other than an oath to support the Constitution of the United States and of this State, shall ever be required as a qualification to any office or public trust under this state.

We further do not consider that any reasonable interpretation of Senate Resolution 17 runs afoul of this provision of the Tennessee Constitution. The resolution is completely devoid of any provision suggesting that the Commissioner of Education must satisfy any religious "test" in order to qualify for her office. The resolution identifies no particular religious belief as desirable or preferred. And while the resolution clearly appears to constitute a rhetorical device designed to advocate the teaching of creationism as an alternative to the theory of evolution, there is no indication that the resolution is intended to attack the Commissioner of the Department of Education's qualifications for her position, nor any suggestion that the Commissioner's position is dependent upon responding to the questions in a specific manner.

Accordingly, this Office is of the opinion that Senate Resolution 17 infringes neither the Establishment Clause of the United States Constitution, nor Article I, Section 4 of the Tennessee Constitution.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

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[5]*See, e.g., Zwerling v. Reagan*, 576 F. Supp. 1373 (C.D. Cal. 1983)(presidential proclamation declaring 1983 as the year of the Bible did not violate the Establishment Clause).

KEVIN STEILING
Deputy Attorney General

Requested by:

Senator Shea Flinn
3 Legislative Plaza
Nashville, TN 37243-0030